

**IN THE FAIR COMPETITION TRIBUNAL
AT DAR ES SALAAM**



(APPEAL NO. 1 OF 2007)

JUMA MPUYA APPELLANT

VERSUS

CELTEL TANZANIA LIMITED RESPONDENT

TCRA

..... RESPONDENT (By order of the Tribunal)

**(Appeal against the Decision of Tanzania
Communications Regulatory Authority Complaint
Committee dated 22nd July, 2006)**

RULING

On 28/2/2007 when the appeal came up for the first time, the parties, including TCRA (Tanzania Communication Regulatory Authority) though not a party, were directed to submit on whether it was properly before the Tribunal. This matter was raised suo motu, because instances in which appeals to the Tribunal can be filed ~~and are~~ spelt out under S. 85 of the Fair Competition Act, No. 8 of 2003, as follows:-

"85 – (1) The Tribunal shall have jurisdiction-

- (a) to hear and determine appeals under Part XI of the Act;*
- (b) to issue warrants in accordance with Section 71;*
- (c) to carry put the functions conferred on it under the EWURA Act, 2001, the SUMATRA Act, 2001, the Tanzania Communication Regulatory Authority Act, 2003, the Tanzania Civil Aviation Authority Act, 2003 and any other written law*
- (d) To exercise such functions and powers as are conferred upon it by the Act;*

do not expressly make reference to a committee but rather to the Authority.

Appeals from TCRA, in terms of S. 85(c), are guided by S. 36(1) of the Tanzania Communications Regulatory Authority Act, No. 12 of 2003 which provides as under:-

36 – (1) Any person aggrieved by the decision of the Authority or any other decision made in connection to the purposes of this Act may appeal to the Fair Competition Tribunal

and S. 42 whose subsections 1 and 2 run as follows:-

42 – (1) This section shall apply to any award of the Authority under which a party has been ordered-

- (a) to pay money in excess of an amount specified in regulations under this Act;*
- (b) to supply goods or services having a market value in excess of amount specified in regulations under this Act;*
- (c) to pay money and supply goods and services where the total amount of the money and the value of the goods or services exceeds an amount, or have market value in excess of an amount specified in regulations under this Act.*

(2) Where a party is not satisfied with an award to which this section applies he may appeal to the Fair Competition Tribunal within twenty one days, thereafter the award shall be placed on the Public Register." (emphasis ^{ours} mine)

The decision being impugned was handed down by what is termed as "TCRA COMPLAINT COMMITTEE" composed of three members – Mr. Baruany E. A. Luhanga, Ag Chairman, Dr. Vuai Iddi Lilla, member and F. Mdachi, member.

The Tribunal's concern revolved around reconciling the term "Authority" in S. 36 and 42 and the term "Committee" appearing elsewhere so as to bring the impugned decision under S.85 of Act 8 of 2003. The Tribunal noted the seemingly mix up of the terms "Committee", "Units", "Divisions" in relation to the term "Authority" and cloudy elements hovering thereon as we shall herebelow demonstrate.

The term "Authority" under TCRA Act, No. 12 of 2003, means-

"The Tanzania Communication Regulatory Authority established under S. 4",

and S. 4, among others, provides,

"There is established a body to be known as the Tanzania Communications Regulatory Authority also known by its acronym "TCRA".

Submitting as per directions of the Tribunal, TCRA, urged that indeed the committee acted under the delegated power^s of the Authority under S. 20 (Act 12/2003) but went on to insist that the appeal has been prematurely lodged as the Appellant has not exhausted the avenue provided by the law under S. 34 and 35 by which he had to apply first to the Internal Review Panel (sic); that the decision of the type is not an appealable award under S. 42 (2) of the Act and that claims and contentions on damages as reflected in the memorandum of appeal are matters for ordinary courts.

On their part, the Respondents did not address the issue but rather simply said that the *"Appellant correctly invoked the jurisdiction of the Tribunal"* although his appeal is time barred having been filed beyond 21 days after the decision.

On the other hand, the Appellant vehemently argued that his complaint went through the channels provided under the Act (No. 12/2003) – S.34, 36, 40, 42; that he lodged his appeal as early as 15/8/2006 to TCRA only to retrieve it later sending it to the Tribunal on 20/10/2006; that if the reference to *"COMMITTEE"* instead of *"AUTHORITY"* is against the law, rectifications should be made accordingly for interest of justice and whatever flaw in the law should be resolved in his favour.

As will be noted outright from the summary of submissions, parties including TCRA did not assist the Tribunal regarding the issue posed.

The above notwithstanding however, the Tribunal has carefully considered the material at its disposal and the two Acts – Act 8 and 12 of 2003 and concluded that although the latter law leaves a lot to be desired, the decision being challenged is that of the Authority, TCRA.

Having carefully gone through the Act, No. 12 of 2003, the Tribunal has concluded that the provisions governing complaints and appeals procedure need revisiting and due amendment. And this, among others, would cover sections 20 – 21, 27, 30, 33 – 36; 40 – 42.

The Tribunal appreciates that the intention of the legislature was to enable the Authority to appoint and delegate its powers to committee and units for the smooth performance of its statutory duties. This is vivid from the wording of S. 20 wherein subsections (1) and (2) provide:-

"20 – (1) There may be established in relation to a matter or matter of a particular kind, a Committee of the Authority composed of not less than two members of the Board.

(2) The Authority may direct that some of its powers in relation to a matter or matters of a particular kind, other than powers the Authority may not delegate under section 21, be exercised by a Committee of the Authority",

whereas S. 21 has the following:

"21. – (1) The Authority may delegate to a member or an employee of the Authority, either generally or otherwise as provided by the instrument of delegation any of its powers other than the power of delegation, its powers to revoke or vary a delegation and the powers referred to in subsection (2).

(2) Notwithstanding the powers conferred to the Authority to delegate, the Authority shall not delegate any of the following powers, namely, power to.

- (a) *grant, renew or cancel a licence with exclusivity and universal obligations;*
- (b) *make any rule or declaration;*
- (c) *fix the method of calculating and reviewing of rates and charges;*
- (d) *make a decision to hold an inquiry;*
- (e) *adopt a report on the results of an inquiry;*
- (f) *adopt a code conduct;*
- (g) *such other matters as the Minister may by notice in the Gazette determine."*

Thus, decisions by committees such formed and upon which due delegation has been made would legally be decisions of the Authority.

Such Committees under the Act seem to be many. We have the "Content Committee" appointed by the Minister under S:27 and which can exercise wide powers of the Authority. The said section provides:-

"27 – (1) The *Committee shall have such powers and functions as the Authority may determine in the exercise of the powers conferred under section 5 and 6 of the Act and in particular shall-*

- (a) *advise the Sector Minister on broadcasting policy;*
- (b) *monitor and regulate broadcast content;*
- (c) *handle complaints from operators and consumers; and*
- (d) *monitor broadcasting ethics compliance.*

(2) The *Committee shall have such functions as the Authority, in the exercise of the powers under this Part may confer to the Committee.*

(3) The *Authority may determine the functions of the Committee which shall include the carrying out of functions in relation to-*

- (a) *matters that concern the content of anything which is or may be broadcast or otherwise transmitted by means of electronic Communications networks; and*
- (b) *the promotion of public understanding of awareness of matters relating to the publication of matter by means of the electronic media.*

(4) *In determining what functions to confer on the Committee, the Authority shall have in particular regard to the desirability of securing that the Committee have at least a significant influence on decisions which-*

- (a) *relate to the matter mentioned in subsection (3); and*
- (b) *involve the consideration of different interests and other factors with respect to different parts of the Mainland Tanzania*

(5) *It shall be the duty of the Committee to ensure, in relation to -*

- (a) *the carrying out of Authority's functions under this Part;*
- (b) *the matters with respect to which functions are conferred on the Authority; and*
- (c) *such other matters mentioned in the Act, as the Authority may determine;*

that the Authority is aware of the different interests and other factors, which in the Committee's opinion, need to be taken into account in respect to the different parts of the Mainland Tanzania in relation to the carrying out of the Authority's functions.

(6) *The Minister may be writing under his hand give the Committee directions of a general or specific nature and the Committee shall comply with every such direction." (emphasis ours)*

The section however, does not provide a linkage between the committee's decisions and the Authority and this is even made worse by sub^{sec}. 6 under which the Minister can give any direction which must be complied with by the Committee as the word used is "shall". One may ask, supposing the directions given conflict with the Authority's delegated power^s?/

Then comes PART VI entitled "REVIEW AND APPEALS PROCEDURE^s" and under this we find a "REVIEW PANEL" whose role seems to be just a source from which members of yet another Committee – Internal Review Committee – can be drawn.

"The Review Panel shall be the source of persons who may from time to time be drawn to form the Internal Review Committee whose functions are as provided under S. 34 of the Act " (S.33 (3)).

Cloudy elements continue to creep in with the contents of S.34. The Committee or a person to whom delegation has been made is made subject of another committee!

"S.34 (1) Any person aggrieved by any decision made on behalf of the Authority under delegated power by-

- (a) a Committee of the Authority; or*
- (b) one or more members or employees of the Authority, may, within fourteen days after receipt of the record of the decision **apply to the Authority for it to review** the decision in question.*
- (2) Upon receipt of an application under subsection (1), the Authority shall appoint an Internal Review Committee which shall consists of -*
 - (a) two members of the Review Panel*
 - (b) One member of the Board*
- (3) The Internal Review Committee shall deliver or send by registered post a copy of the application for review and a written invitation to make submissions on the application to the following persons-*

-

 (4)
 (5)
 (6) *The Internal Review Committee-*
- (a) *shall comply with section 34 and **may exercise the powers of the Authority under that section;***
 - (b) *may take such steps, including exercising the powers of the Authority to obtain in information, documents and evidence under section 17, as it deems necessary to inform itself of matters relevant^{to} the applications for review.*
 - (7) *Within three weeks after receipt of the submission under subsection (4) the Internal Review Committee shall consider the application together with any submissions received, **prepare a recommendation and submit to the Authority for its decision.***
 - (8) *The Internal Review Committee may recommend to the Authority to-*
 - (a) *dismiss the application;*
 - (b) *sets aside the original decision and make a different decision;*
 - (c) *vary the decision; or*
 - (d) *set aside the decision and delegate the matter to a Committee or one or more members or officers of the Authority for a fresh decision without directions as to ways in which that decision will be made.*
 - (9) *The Authority shall make a determination on the recommendation by the Internal Review Committee by a vote of the majority of its members may either confirm, vary or dismiss the decision subject of review." (Emphasis ours)*

What do we note from this section? Among many, we note the following:

- (a) *the words in S. 34 (1) "made on behalf of the authority" are superfluous – the following three words "under delegated powers" suffice for the purpose.*
- (b) *Applications under this section are for reviews and not appeals*
- (c) *the decision of the Committee of Authority or related has no finality as seemingly portrayed under S. 20 and 21 because they are subjected to Internal Review Committee*
- (d) *although subsection 1(b); 6(a) and (b) at first portray the Internal Review Committee as having finality word on decision as it is put in the shoes of the Authority, subsection 7 takes it away as it has to "prepare a recommendation and submit to the authority for its decision"! Subsection (9) shows that it is the Authority which has a final say.*
- (e) *a further confusion is set in by S. 35 read together with S. 36. Under S. 35 if the decision of the Committee or member of the authority is not impugned it becomes final but if it is, it is not, and as we have seen under S. 34 it has to go through the Internal Review Committee. **At the sametime however, S.36 provides the opposite. A dissatisfied party may appeal straight to the Tribunal!***

And this wanting scenery does not end here. We have also PART VIII entitled 'COMPLAINTS AND DISPUTE RESOLUTION' s. 40 appearing thereunder provides:

"40 – (1) This section shall apply to any complaint against a supplier of regulated goods or services in relation to any matter connected with the supply, possible supply or purported supply of the goods or services.

(2) Where a complaint is referred to or otherwise comes to the attention of the Authority and it appears to the Authority that-

(a) the complainant has an interest in the matter to which the complaint relates, and

(b) the complaint is not frivolous or vexatious, the

Authority shall investigate the matter-

- (3) *Where it appears to the Authority at any time during or after its investigation that the supplier has not considered the complaint, or has not considered it adequately, the Authority may refer the complaint to the supplier with a request that the supplier should consider or re-consider the complaint.*
- (4) *The Authority may make representations to the supplier on behalf of the complainant or to the complainant on behalf of the supplier as the Authority sees fit.*
- (5) *Subject to the provisions of this Act, if a complaint is not resolved to the satisfaction of a complainant within sixty days after the Authority first became obliged to investigate, the complainant may by writing signed by him request the Authority to refer the complaint to a Committee of the Authority for decision.*
- (6) *After the complaint is referred to a Committee for decision as provided under subsection (5), the complainant and the suppliers shall be parties to the reference.*
- (7) *For the purposes of dealing with consumer complaints, the Authority shall establish a dedicated unit which shall receive and follow up on complaints from consumers.*
- (8) *The units referred to in subsection (7) shall investigate all complaints and attempt to resolve the complaints amicably, and in the event they cannot be resolved within thirty sixty days, the Committee concerned shall present its findings and recommendations to the Authority for action.*
- (9) *Subject to the provisions of this section, the Authority shall in each case make a ruling to be carried out by the Division concerned."*

Now, one wonders whether this "Committee of the Authority" referred to under subsection (5) is the same as the one referred to in the other provisions ie 34, 35 and 36.

Again, one wonders about the intended nexus, if any, between S.40 (1) – (6) and ^{sub.8}(7) – (9). Are the "units" and "committees" the same? Is the committee referred to under sub.^{sec}8 the same as the one referred to under S. 40 (5)?

The Tribunal is of the view that:

- (a) subsections 7-9 of S.40 are disjointed from the rest of the preceding part as much as sub.^{section}8 mixes up units and Committees.
- (b) subsections (7) – (8) are either misplaced or lacking in substance – possibly it was intended to establish units which would assist the committee to make a decision.
- (c) after sub.^{section} (6) it should clearly be indicated what follows – what is to be done by the "Committee of Authority" and whether it has a finality say or has to recommend to the Authority for action/final decision.
- (d) subsection 9 surely cannot be saying what was intended. It is not clear whether it was intended that the Authority make a decision on the findings of its own Committee. Would the Authority's ruling be on directions to "Divisions" or on what has been decided by the Committee mentioned under S.40(5) and dealing with a matter covered under S.40(6)?
- (e) in any case, a totally new element is introduced under subs.9: which "divisions" are being referred to?

Moving on, we have S. 41 and ^{S.}42. While the relevant part ^{S.} in S.42 have already been quoted, S.41 provides:

"41 – The Authority may make an order-

- (a) requiring a party to supply goods or services or specified period;
- (b) requiring a party to supply goods or services or specified and conditions;

- (c) *requiring a party to pay the costs of another party or of a person appearing at the hearing or producing documents;*
- (d) *dismissing a complaint;*
- (e) *imposing fines;*
- (f) *for specific performance;*
- (g) *for refunds;*
- (h) *appointing trustees;*
- (i) *setting up of escrow accounts; and*
- (j) *for such other relief as may be deemed necessary or reasonable."*

One would justifiably ask ^{one}himself whether these provisions apply to the Act generally or to only matters arising under S.40.

We have quoted at length the relevant sections purposely-to show the wanting elements which made us raise the issue suo motu: it is not clear as to which committee is being referred to by which section and what powers does it exactly wield.

It is no wonder that the Appellant in his submissions insists that he passed through the procedure provided under S.34 and as well as that under S.40 though they are different. Again, it is no wonder that TCRA nets itself in contradictions when it submits that the committee's decision was that of the "Authority" and yet still charges that the appeal was prematurely lodged as it had not gone through what they inadvertently call an Internal Review Panel (under the section it is termed an Internal Review Committee). Again, it is no wonder that the Appellant entitles his appeal to the Tribunal (interestingly after being so advised by the TCRA's letter of 25.7.2005 also quoted in this ruling) as being an "Appeal made u/s 42 of Act No. 12/2003 read together with S.85 of the Fair Competition Tribunal Act, No. 8/2003), while clearly, as the contents quoted above display, S.42 do not cover the present Appellant . The section is categorical –

see the quoted subs, 1(a) (b) and (c). Nowhere, even closer to any of those can the Appellant place his disgruntlement - he is neither a supplier nor a service provider.

The Tribunal is of the view that PARTS VI and VIII should be put together and streamlined for simplicity to stakeholders. This will remove the confusious parallel avenues of dealing with complaints and assailing of decisions under the Act. The ladder to be followed would be clearly spelt out.

All the above said, regard being had to the spirit of S. 85 (3) (Act 8/2003), that:

"The Tribunal shall in exercise of its functions under this Act be guided by the rules of natural justice"

and Rule 28 (2) of The Fair Competition Tribunal Rules made under S.89 of the Act which provides:

"28 (2) In its proceedings the Tribunal shall observe principles of natural justice, avoid formality and technicality of rules of evidence as much as possible with view to ensuring just, expeditious and economical handling of the proceedings",

and this taken together with the confusious nature of the law as detailed, and, above all, the steps taken by the parties in the matter, the Tribunal is satisfied that the decision being appealed is the decision of the Authority because it is a decision of the committee of the Authority.

The Appellant first complained to TCRA's Director General who directed Respondents to look into the matter, and, who upon receipt of the finding of Respondents dismissed the complaint upon which the Appellant in terms of S. 40 (5) of Act 12/2003 applied that the matter be placed in the hands of a "Committee of Authority" which was done and the latter came out with the decision which is being challenged.

The Director General's letter to Appellant which runs as under:

"Ref. TCRA/C.90/9/2

25th July, 2006

Juma M. Mpuya,
S.L.P. 1133,
Mahuta, Newala

**YAH: MAAMUZI YA KAMATI YA TUME YA MAWASILIANO
TANZANIA KUHUSU RUFAA YA SHAURI LAKO DHIDI YA
CELTEL TANZANIA LIMTED.**

Husika na kichwa cha habari hapo juu.

Utakumbuka kuwa Kamati ya malalamiko ya Mamlaka (kamati) ilifanya kikao chake tarehe 17 Juni 2006 ambacho wewe pamoja na wakilishi wa upande wa utetezi mlihudhuria na kutoa maelezo yanayohusu shauri hilo.

Mamlaka inakufahamisha kuwa, Kamati ya malalamiko ya Mamlaka imeyapatia maelezo ya pande zote mbili na kwa kuzingatia sheria ya Mamlaka ya Mawasiliano Tanzania Namba 12, 2003, na hivyo imetoa uamuzi wa shauri lako kama inavyoonyeshwa kwenye kiambatanisho na barua hii. Iwapo hujaridhika na maamuzi haya, unatakiwa kwa kuzingatia sheria ya Mamlaka ya Mawasiliano Tanzania Namba 12, 2003, kifungu cha 42(2), unatakiwa kukata rufaa kwa Fair Competition Tribunal na kuiwakilisha ndani ya siku ishirini na moja kuanzia leo hii olipoandikwa barua hii, la sivyo shauri litafungwa na kuwekwa kwenye masijala ya wazi (Public Registrar).

Wako katika ujenzi wa taifa.

**Pof. John S. Nkoma
MKURUGENZI MKUU**

*Nakala kwa: Mkurugenzi Mtendaji,
Celtel (T) Ltd,
P. O. Box. 9623,
DAR ES SALAAM",*

gives credence to the stand reached. The Authority was categorical: notifying him that he had exhausted the avenue at its disposal and could then proceed to the Fair Competition Tribunal. Of course, the Tribunal is disadvantaged by lack of facts surrounding this "*Committee of Authority*", especially on its appointment and extent of its mandate but we hope that the heat generated by the current issue will sound a sufficient warning to TCRA to put its house in order administratively, and, legally by seeking amendments where necessary. It is not just speculation for example, to envisage a challenge on the mandate of any Committee or related issue in future.

And, in terms of S. 36 of Act 12/2003 as already quoted, so far as the law stands, a person aggrieved by such a decision can appeal to the Tribunal as the Appellant has done. We are satisfied that the decision of the **Complaint Committee of the Authority** delivered on 22/7/2006 can be appealed against to this Tribunal. Having so decided, the other arguments raised by the parties and which do not relate to the issue they were asked to address stand disregarded.



L. B. Kalegeya, J - Chairman

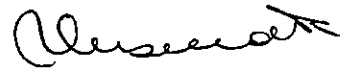
Janet Mbene - Tribunal Member



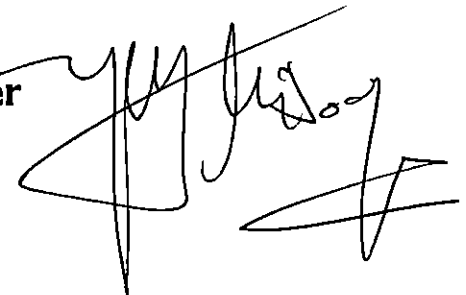
Jonathan Njau - Tribunal Member



Prof. J. M. Lussuga Kironde - Tribunal Member

Felix Kibodya - Tribunal Member



Delivered on 12th March, 2007.



L. B. Kalegeya, J - Chairman

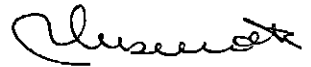
Janet Mbene - Tribunal Member



Jonathan Njau - Tribunal Member



Prof. J. M. Lussuga Kironde - Tribunal Member



Felix Kibodya - Tribunal Member

